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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

CHARLES RICHARD ANDERSON et al., Plaintiffs and Appellants, v. JACK FINCH et al., Defendants and Respondents.	C079723 (Super. Ct. No. 178677)

In a medical malpractice case based on breach of the standard of care, expert testimony is generally required to establish both the standard of care and the defendant's breach thereof. (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.) In this medical malpractice case, alleging the negligent failure to diagnose colorectal cancer, plaintiffs attempted to amend the complaint to add a claim for punitive damages and to defeat a defense motion for summary judgment. The defense motion was supported by an expert declaration that concluded the standard of care was met, while

plaintiffs did not present any expert testimony in their opposition. As we explain, the trial court properly ruled against plaintiffs.

Plaintiffs Charles and Lillian Anderson brought suit against defendants Jack Finch, M.D. (Finch), Shasta Family Practice Medical Group, Inc., and Jack Finch, M.D., Inc. for medical malpractice and loss of consortium after Charles Anderson (Anderson) was diagnosed with and treated for colorectal cancer that Finch had not discovered despite performing two earlier colonoscopies. After the trial court granted defendants' motion for summary judgment, plaintiffs appealed.[1] On appeal, plaintiffs contend the trial court erred in: (1) denying their motion for leave to amend the complaint to add a claim for punitive damages pursuant to Code of Civil Procedure section 425.13[2] because they met the procedural requirements and demonstrated a substantial probability of prevailing; (2) granting defendants' motion for summary judgment because most of defendants' evidence was inadmissible, there was negligence that was obvious to a layperson and did not require expert medical evidence, and the trial court should have accepted plaintiffs' late expert evidence; and (3) ordering plaintiffs to pay defendants' expert witness fees without a court order authorizing discretionary costs. We find no error and affirm.

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[1] Plaintiffs initially appealed from the order granting summary judgment and the order denying leave to amend. It is well settled that both of these orders are nonappealable. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 824, fn. 19; see *Modica v. Merin* (1991) 234 Cal.App.3d 1072. 1074, where this court refused to continue indulging in "the fiction that a nonappealable order [granting summary judgment] incorporated a judgment of dismissal.") Apparently, the trial court misplaced the initial notice of appeal. In the interim, judgment was entered. Plaintiffs filed a subsequent notice of appeal from the judgment.

[2] Further undesignated statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

The Colonoscopies

Finch was Anderson's primary care physician. On October 7, 2010, Anderson saw Finch, complaining of rectal bleeding and abdominal pain. Finch performed a colonoscopy on November 4, 2010; he found diverticulum and several colonic polyps which he biopsied and sent for analysis. Finch recorded a question mark as to a polyp near the rectum. The pathologist analyzed five samples. As to each, he found no high grade dysplasia or malignancy. The pathologist found the polyp that Finch had questioned was a 1.5 centimeter tubulovillous adenoma with no high grade dysplasia or malignancy. Finch recommended that Anderson have another colonoscopy in three years.

Anderson returned to Finch on September 9, 2011, with the same (or worsening) symptoms. Finch performed another colonoscopy on September 15, 2011. He found some colitis which he biopsied and sent for analysis. The pathologist found minimal chronic inflammation and no atypia or significant inflammation and did not identify any malignancy. Finch diagnosed Anderson with colitis. Apparently, around this time Finch also ordered blood tests for cancer markers, Carcinoembryonic Antigen (CEA) tests.

Still symptomatic in August 2012, Anderson went to the Redding Endoscopy Center where Dr. Hongguang Liu performed a colonoscopy. Liu found a rectal mass. The pathologist found it was invasive moderately differentiated adenocarcinoma or cancer. Anderson underwent chemotherapy, radiation, and surgery.

The Lawsuit

In November 2013, Anderson and his wife brought suit against defendants for medical negligence and loss of consortium. The complaint alleged plaintiffs employed and retained defendants "to examine, care for, diagnose and professionally treat [Anderson's] chronic and worsening symptoms and condition of colorectal cancer, which Defendants utterly failed to assess, diagnose, treat, or even refer to a competent physician

or specialist given Plaintiff's status as a high-risk colon cancer candidate." It alleged defendants "failed to possess and exercise the proper degree of knowledge and skill" and that the corporate defendants "breached [their] duty to assure competence of its staff physicians and/or failed to exercise ordinary care under the circumstances, to evaluate and to assure the quality of its medical staff and resultant medical care by its physicians, and breached [their] duty of selecting, reviewing, and periodically evaluating the competency of [their] staff physicians."

Motion for Leave to Amend to Add Claim for Punitive Damages

Plaintiffs moved to amend the complaint to add claims for punitive damages. The new claims were based on the allegations that defendants actively concealed Anderson's true medical condition and Finch performed at least one unnecessary surgical procedure. Plaintiffs contended Anderson's four-year battle with cancer could--and should--have been prevented if Finch had exercised minimal care and referred Anderson to a specialist and not concealed the results of cancer screening blood tests. Plaintiffs claimed Finch had concealed numerous facts, including: the discovery of a pre-cancerous adenoma in Anderson's colon in 2010; that Finch realized he erred in diagnosis of the cancer in 2011; that Finch ordered CEA tests after the 2011 colonoscopy and the tests returned abnormally high results; that specialists usually perform colonoscopies, and that Finch did not have adequate assistance and image capturing during the colonoscopies.

Plaintiffs' proposed amendment would add three new causes of action for fraud (concealment), battery, and intentional infliction of emotional distress.

In support of the motion, plaintiffs provided Anderson's declaration and various medical records including lab reports showing Anderson had a CEA result of 42.9 in September 2011 and 44.8 in December 2011. They requested that the court take judicial notice of articles from medical publications that counsel had downloaded from the Internet. Plaintiffs also provided defendants' answers to interrogatories and requests for admission in which Finch admitted: he diagnosed Anderson with colitis, hemorrhoids,

gastritis and proctosis; he did not refer Anderson to a gastroenterologist; he identified adenomatous polyps; Anderson had symptoms associated with multiple conditions including colorectal cancer; Finch did not diagnose Anderson with colorectal cancer; he had no videos of the colonoscopies; he did not record descriptions of his biopsy techniques; and adenomatous polyps are more likely than hyperplastic polyps to be become cancerous, although most do not.

Defendants opposed the motion, contending plaintiffs failed to either properly state or substantiate the claim for punitive damages. Defendants argued plaintiffs failed to allege that Finch discovered the tumor or that he withheld that information with an intent to deceive, and that they failed to allege malice. Further, plaintiffs failed to present expert testimony about the CEA tests. There was no battery because Anderson consented to the colonoscopies and no facts pled to support the allegation that Finch intended to cause emotional distress.

The trial court denied the motion. The court denied judicial notice of a LabCorp sheet explaining the CEA test because it was hearsay and without foundation. The court found the purpose, reasons to order, and interpretation of a CEA test were not common knowledge, but required an expert opinion. The court also declined to take judicial notice of the various articles and guidelines that plaintiffs offered, finding that "[w]ithout competent medical testimony establishing breach of the standard of care and a failure to warn by defendant, plaintiffs have failed to meet their initial burden to allow for amendment with punitive damages."

The Summary Judgment Motion

Defendants moved for summary judgment, contending one or more elements of plaintiffs' causes of action could not be established.

In support of the motion, defendants provided the declaration of John Cello, M.D. Cello was board certified in internal medicine and gastroenterology and a Professor of Medicine and Surgery at the University of California, San Francisco. He had extensive

experience with endoscopy and colonoscopy, and with the recognition and removal of polyps. He had published numerous papers, chapters, and abstracts in his field. He had reviewed medical records from Finch, Gastroenterology Associates Endoscopy Center, the Solace Cancer Center, R. Douglas Matthews, M.D. (who performed surgery on Anderson after his cancer diagnosis), and the original pathology slides. The medical records were provided. He had also reviewed Finch's declaration.

Cello recited the history of Anderson's three colonoscopies. In his professional opinion, the care and treatment Finch provided to Anderson was within the standard of care. Colonoscopy was the proper diagnostic examination given Anderson's reported symptoms in October 2010. Cello noted the increasing trend of screening and diagnostic colonoscopy by primary care physicians, due in part to the lack of dedicated endoscopists to meet the demand. A primary care physician who performs a colonoscopy should be held to the same standard of care as a gastroenterology specialist, and in Cello's opinion Finch met that standard of care. Finch's training and experience, as set forth in his declaration, "was far more than adequate to meet the requirements for competency as an endoscopist" and the records of the colonoscopies demonstrate "a high degree of competency in that Dr. Finch was able to identify and describe lesions as small as two millimeters."

Cello noted that in the October 2010 colonoscopy Finch identified a suspicious polyp, excised it, and sent it to a pathology lab. The lab reported no high grade dysplasia and no malignancy; thus Finch's recommendation to repeat the procedure in three years was "quite appropriate." No additional testing or imaging was indicated given the pathology findings and Finch's observations. In September 2011 Finch appropriately biopsied an area of colitis; then lab analysis indicated a benign result. "There is no evidence to suggest that on either examination Dr. Finch simply failed to observe a lesion that would have proven to be cancerous at the time."

In his declaration, Finch stated that during his residency he had trained for two months with a gastroenterologist and performed several colonoscopies under supervision. Over the last 25 years he had performed about 100 colonoscopies a year, one-third of which included biopsies.

Plaintiffs opposed the motion for summary judgment, claiming defendants' evidence was "grossly objectionable" as Cello's declaration was based largely on inadmissible hearsay and Finch failed to include his curriculum vitae (which had previously been provided in opposition to the motion to amend). Plaintiffs argued defendants had failed to meet their burden on all theories of liability.

Plaintiffs objected to many portions of Cello's declaration, primarily on the bases of lack of foundation and hearsay. They objected to Finch's declaration on the basis of lack of personal knowledge and lack of foundation for his treatment of Anderson because he "fails to cite any written evidence supporting his statements." As evidence in support of the opposition, plaintiffs provided Anderson's declaration and Finch's answers to interrogatories and requests for admissions. They did not offer *any* expert evidence. Defendants objected to Anderson's declaration.

The trial court overruled most of plaintiffs' objections to defendants' evidence, but sustained all of defendants' objections to Anderson's declaration. The court granted the motion for summary judgment. The court found that without competent medical testimony plaintiffs failed to establish any triable issue of material fact as to medical negligence. The loss of consortium cause of action also failed because it was derivative of the negligence cause of action.

DISCUSSION

I

Motion to Amend to Add Claim for Punitive Damages

Plaintiffs contend the trial court erred in denying their motion to amend the complaint to add claims for punitive damages. They contend Finch's conduct establishes

a prima facie showing of " 'malice, oppression, or fraud' " due to his conscious disregard for the consequences of concealing material information about Anderson's cancer.

A. *Code of Civil Procedure Section 425.13*

"In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier." (§ 425.13, subd. (a).) Here there is no issue as to the timeliness of plaintiffs' motion.

The motion required by section 425.13 "operates like a demurrer or motion for summary judgment in 'reverse.' Rather than requiring the *defendant* to defeat the plaintiff's pleading by showing it is legally or factually meritless, the motion requires the *plaintiff* to demonstrate that he possesses a legally sufficient claim which is 'substantiated,' that is, supported by competent, admissible evidence." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719 (*College Hospital*).)

"[T]he gravamen of section 425.13(a) is that the plaintiff may not amend the complaint to include a punitive damages claim unless he both states and substantiates a legally sufficient claim. In other words, the court must deny the section 425.13(a) motion where the facts asserted in the proposed amended complaint are legally insufficient to support a punitive damages claim. (See §§ 430.10, 436-437.) The court also must deny

the motion where the evidence provided in the 'supporting and opposing affidavits' either negates or fails to reveal the actual existence of a triable claim. (See § 437c, subd. (c).) The section 425.13(a) motion may be granted only where the plaintiff demonstrates that both requirements are met. This test is largely consistent with the 'prima facie' approach formulated by the Courts of Appeal.

"Moreover, in light of the 'affidavit' requirement and by analogy to summary judgment practice, substantiation of a proposed punitive damages claim occurs only where the factual recitals are made under penalty of perjury and set forth competent admissible evidence within the personal knowledge of the declarant. (See §§ 437c, subds. (b) & (d), 2015.5.) Consistent with the legislative intent to protect health care defendants from the drastic effects of unwarranted punitive damage claims, the entire package of materials submitted in support of the section 425.13(a) motion should be carefully reviewed to ensure that a genuine contestable claim is indeed proposed." (*College Hospital, supra,* 8 Cal.4th at pp. 719-720.)

We review de novo a trial court's ruling on a motion to amend a complaint to allege punitive damages. (*Pomona Valley Hospital Medical Center v. Superior Court* (2013) 213 Cal.App.4th 828, 835.)

B. *Analysis*

Plaintiffs sought to amend the complaint to add a cause of action for fraud based on concealment. "The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact. [Citation.]" (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606 (*Graham*).)

Plaintiffs contend Finch concealed that (1) he found pre-cancerous adenomas in 2010; (2) in 2011 Finch discovered he erred in identifying and diagnosing Anderson's cancer; (3) he ordered two CEA blood tests after the second colonoscopy; (4) the CEA test results were more than ten times the maximum normal value; (5) the CEA tests showed an increase in cancer markers in the three months following the second colonoscopy; (6) colonoscopies are invasive procedures usually performed by specialists in a surgical facilities; and (7) he did not employ any assistance or image capturing during the colonoscopies.

The foundation of plaintiffs' fraudulent concealment claim is the CEA tests and their results. They contend these tests revealed that Anderson had cancer in 2011 and Finch failed to reveal that fact. In the trial court, plaintiffs argued their claim that Finch first learned of the tumor during the 2011 colonoscopy and concealed the finding is "exemplified" by his subsequent ordering of the CEA tests. But plaintiffs offered *no competent admissible evidence* as to what CEA tests are, why a doctor might order the test, or the significance of the results in this particular case. The trial court declined to take judicial notice of the lab sheet explaining the test, a ruling plaintiffs do not challenge on appeal. The only other evidence offered came from descriptions offered by Anderson and his counsel, who were not competent to offer evidence on the CEA test. Objections to this evidence were sustained and plaintiffs do not challenge these rulings on appeal. Nor can they raise a meritorious challenge, as expert medical testimony was required to offer evidence on this test. The CEA test and the conclusions drawn therefrom "are based upon medical research, and involve questions of chemistry and biology with which a layman is entirely unfamiliar." (*Arais v. Kalensnikoff* (1937) 10 Cal.2d 428, 431 [blood test to determine paternity].)

Plaintiffs also allege Finch fraudulently concealed the proper procedures for performing colonoscopies and the need for a specialist, surgical facility, licensed assistance, and imaging capabilities. But again, the allegations are completely

unsupported. Expert medical evidence is required to establish what conditions are necessary to perform a colonoscopy within the standard of care. "Where a medical process or procedure is not a matter of common knowledge, expert testimony is necessary to determine whether a probability of negligence appears from the happening of an accident or untoward result. [Citation.]" (*Folk v. Kilk* (1975) 53 Cal.App.3d 176, 185.) "The standard of skill, knowledge and care prevailing in a medical community is ordinarily a matter within the knowledge of experts. [Citation.]" (*Ibid*.)

Thus plaintiffs failed to substantiate most of the bases of the alleged concealment. What remains is the allegation that Finch failed to inform Anderson that he found adenomatous polyps. Again, plaintiffs provided no expert testimony as to what adenomatous polyps are, the significance of their discovery, why the information should have been disclosed, or the consequence of failing to disclose it. This bare allegation of a failure to disclose is insufficient to plead fraudulent concealment. Absent a connection between the adenomatous polyps and Anderson's subsequent cancer, there is no sufficient allegation of duty to disclose, intent to defraud, detrimental reliance or damage. (See *Graham, supra,* 226 Cal.App.4th at p. 606.)

The proposed new causes of action for battery and intentional infliction of emotional distress fare no better as they are based on the fraudulent concealment. Plaintiffs contend the tests were battery because Anderson's consent was obtained by fraudulent concealment. The fraudulent concealment serves as the "extreme and outrageous conduct" behind the intentional infliction of emotional distress claim. Since the fraudulent concealment claims fails, the other claims fail as well.

The trial court did not err in denying plaintiffs' motion to amend the complaint to add punitive damages.

II

Motion for Summary Judgment

Plaintiffs contend the trial court erred in granting defendants' motion for summary judgment because defendants failed to carry their burden to establish they were entitled to judgment. Plaintiffs contend the declarations of both Finch and Cello are inadmissible in large part because they are not based on personal knowledge, most of the facts and opinions lack foundation, and they are based on hearsay.

A. *The Law on Summary Judgment*

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence." (§ 437c, subd. (c).)

"A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (§ 437c, subd. (p)(2).) "Where the party moving for summary judgment fails to meet its burden, 'summary judgment must be denied despite the lack of opposing declarations.' [Citation.]" (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743.)

"In evaluating the propriety of a grant of summary judgment our review is de novo, and we independently review the record before the trial court. [Citation.] In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment. [Citation.]" (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. omitted.)

B. *Objections to Declarations*

On appeal, plaintiffs renew their objections to the declarations of Cello and Finch. We construe this contention as a challenge to the trial court's overruling of plaintiffs' objections thereto.

Plaintiffs acknowledge the split of authority as to the standard of review for evidentiary rulings in the summary judgment context, and argue "the trend tends to favor *de novo* review." We disagree. Although our Supreme Court expressly declined to reach the issue in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535, the weight of authority (both before and after *Reid*) holds that an appellate court applies an abuse of discretion standard when reviewing a trial court's rulings on evidentiary objections made in connection with a summary judgment motion. (See, e.g., *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852; *Ahn v. Kumho Tire U.S.A., Inc*. (2014) 223 Cal.App.4th 133, 143-144; *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 82-83; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

"As the parties challenging the court's decision, it is plaintiffs' burden to establish such an abuse, which we will find only if the trial court's order exceeds the bounds of reason. [Citation.]" (*DiCola v. White Bros. Performance Products, Inc*. (2008) 158 Cal.App.4th 666, 679.) Further, plaintiffs must show any abuse of discretion was prejudicial. (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119.)

1. *Finch's Declaration*

Plaintiffs contend Finch's declaration lacked personal knowledge and lacked foundation because he failed to cite any written evidence supporting his statements. To the contrary, Finch's declaration *did* establish personal knowledge because he declared what he personally did in treating Anderson. " 'Personal knowledge' means a 'present recollection of an impression derived from the exercise of the witness' own senses.' " (Cal. Law Revision Com. com., 29B pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 702, p. 300.) Personal knowledge may be shown by the witness's testimony. (Evid. Code,

§ 702, subd. (b).) Finch's personal knowledge established the foundation for his declaration. (Evid. Code, § 403, subd. (a)(2).) Further, Finch did provide written evidence. He authenticated the medical charts submitted to the court as Exhibit A to his declaration.

In objection No. 13, plaintiffs objected to Finch's statement that in the second colonoscopy he observed diverticuli, hemorrhoids, areas of colitis, and some polyps because the medical records showed only that he observed areas of colitis. In response, counsel explained that he may have misinterpreted the medical records in preparing the declaration, but any error was irrelevant and could not give rise to a triable issue of material fact. The trial court agreed, and plaintiffs have failed to show otherwise.

The trial court did sustain plaintiff's objection No. 14, the reference to Exhibit B, Finch's curriculum vitae, which had not been attached to the declaration. The court, however, did consider Finch's curriculum vitae as it had already been provided to plaintiffs and the court in connection with the motion to amend the complaint. Plaintiffs do not contend the trial court erred in this regard or that the error prejudiced them.

2. *Cello's Declaration*

Plaintiffs objected to the majority of Cello's declaration as lacking personal knowledge, lacking foundation, and based on hearsay.

"It is sufficient, if an expert declaration establishes the matters relied upon in expressing the opinion, that the opinion rests on matters of a type reasonably relied upon, and the bases for the opinion. [Citation.]" (*Sanchez v. Hillerich & Bradsby Co*. (2002) 104 Cal.App.4th 703, 718.)

To provide an expert opinion, a person must have sufficient "special knowledge, skill, experience, training, or education." (Evid. Code, § 720, subd. (a).) " 'He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged

with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured.' " (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 478.) By setting forth his education and extensive experience in his declaration and the attached 26-page curriculum vitae, Cello established his competence to testify as an expert and provided the general foundation for his opinions about Finch's compliance with the standard of care and the trend of primary care physicians performing colonoscopies.

"An expert may rely on otherwise inadmissible hearsay evidence provided the evidence is reliable and of the type that experts in the field reasonably rely upon in forming their opinions. [Citations.]" (*People v. Yuksel* (2012) 207 Cal.App.4th 850, 856.) Medical records, although hearsay, can be used as a basis for an expert medical opinion. (*Garibay v. Hemmat*, *supra*, 161 Cal.App.4th at p. 743.) In *Garibay*, the court reversed a summary judgment entered in favor of the defendant doctor in a medical malpractice action, finding the expert declaration in support of the doctor's motion lacked foundation. Defendant's medical expert had not demonstrated personal knowledge of the underlying facts on which he based his opinion because his declaration "attempted to testify to facts derived from medical and hospital records which were not properly before the court." (*Id*. at p. 743.) The moving papers did not include authenticated copies of the medical records on which the expert based his opinion. (*Ibid*.) In contrast, here the medical records that Cello reviewed and on which he based his opinions were authenticated and properly before the court.

Plaintiffs objected to portions of Cello's declaration that demonstrate inexcusable sloppiness in drafting the declaration. Defendants explained and corrected these errors in response. Plaintiffs fail to show such errors undermined Cello's opinions or prejudiced them in any way. In addition to the same error as in Finch's declaration about the observations in the second colonoscopy, Cello's declaration did not identify *whose* medical records he reviewed, only the doctors and medical entities they were received

from. While Cello's declaration should have been prepared more carefully, because the medical records were provided--to him and to the court--and they were records of *only Anderson's* care and treatment, there was no uncertainty as to the medical records reviewed. The declaration also misstated the date of the first colonoscopy, but plaintiffs were not misled. In objection No. 2, plaintiffs objected to Cello's description of a polyp at four centimeters from the anus because no such polyp is shown on the colonoscopy report. Defendants explained the "4 cm" figure was a typographical error; it should have been five centimeters. Thus while there was a disconcerting lack of care in drafting the declaration, plaintiffs fail to show any significance in the errors.

Plaintiffs contend there is no foundation for Cello's citing Finch's ability to identify a two millimeter polyp. But such a polyp is identified in the pathology report.

The expert declaration must also show the expert's reasoning; both the matters relied upon in expressing the opinion and the bases for the opinion. (See *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523-524.) In *Kelley*, the plaintiff lacerated his arm and subsequently required surgery; the court granted summary judgment to the defendant physician who treated the plaintiff in the days before the surgery. The defendant had provided an expert declaration that recited the facts of his care and treatment of the plaintiff and opined that the defendant " 'acted appropriately and within the standard of care under the circumstances presented.' " (*Id*. at p. 522.) The appellate court reversed for three reasons. First, the declaration failed to disclose what matter the expert relied on in forming the opinion, although this ground had been forfeited by failure to object. Second, there were no reasons or explanation given for the opinion; it failed to address crucial issues, such as the nature of plaintiff's condition, what symptoms should have been observable, whether the possibility of severe complications should have been recognized, and whether earlier intervention would have mitigated the injury. Third, a well-credentialed expert presented an opposing opinion. (*Id*. at p. 524.)

Kelley has been criticized to the extent that it requires an expert declaration to "set forth in excruciating detail the factual basis for the opinion stated." (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 608, fn. 6.) In any event, we find *Kelley* distinguishable. Here, Cello did not simply summarize Anderson's treatment and state in a conclusory fashion that it was within the standard of care. Rather, he opined that given Anderson's symptoms, colonoscopy was the proper diagnostic examination. He added that Finch had adequate training and experience to perform colonoscopies and he performed the colonoscopies within the standard of care of a gastroenterology specialist. He detailed that Finch's competency was shown by his ability to identify and describe a lesion as small as two millimeters. Cello opined that Finch's recommendation after the first colonoscopy for a second one in three years was appropriate and no additional testing or imaging was indicated given the pathology findings; an area of colitis was appropriately biopsied during the second colonoscopy and lab analysis indicated a benign result; and there was no evidence to indicate Finch failed to observe a cancerous lesion.

The trial court did not err in overruling plaintiffs' objections to the declarations of Finch and Cello.

C. *Failure to Address All Theories of Liability*

Plaintiffs contend defendants were not entitled to summary judgment because they failed to address and refute all of plaintiffs' multiple theories of liability. They assert their "non-exhaustive" list of theories of professional negligence include: (1) failure to effectively diagnose and treat Anderson, including performing standard tests such as fecal occult blood tests and digital rectal exams; (2) failure to refer Anderson to a specialist; (3) reassuring Anderson he did not have cancer with no medical basis; (4) failure to competently perform two colonoscopies, including failure to identify the tumor, failure to have medical professional assistance present, and failure to photograph, videotape or otherwise record observations; (5) failure to disclose the existence of a tumor; and (6) failure to report to Anderson the results or existence of CEA tests.

In determining the issues that a motion for summary judgment must address, we look to the pleadings. " 'The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues' " and to frame "the outer measure of materiality in a summary judgment proceeding." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) Accordingly, a defendant moving for summary judgment must only negate plaintiff's theories of liability as alleged in the complaint; a moving party need not refute liability on some theoretical possibility not included in the pleadings simply because it was raised elsewhere.[3] (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254-1255.)

The complaint alleged defendants "failed to assess, diagnose, treat, or even refer [Anderson] to a competent physician or specialist"; and "failed to possess and exercise the proper degree of knowledge and skill in examining diagnosing, treating, and caring for" Anderson. The corporate defendant(s) "breached its duty to assure competence of its staff physicians and/or failed to exercise ordinary care under the circumstances, to evaluate and to assure the quality of its medical staff and resultant medical care by its physicians, and breached its duty of selecting, reviewing, and periodically evaluating the competency of its staff physicians."

Of the six theories of liability plaintiffs set forth on appeal, the complaint contains only four, those based on breach of the standard of care. The complaint does not allege a theory of liability based on Finch's failure to report the results of the CEA test (concealment or failure to warn) or in reassuring Anderson he did not have cancer when the medical evidence was otherwise (misrepresentation). The summary judgment motion

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[3] At the hearing on the summary judgment motion, plaintiffs' counsel argued that defendants had notice of additional theories of liability because they were set forth in the notice of intent to sue. (§ 364.) We cannot assess the accuracy of this assertion because the notice is not in the record. Moreover, as we explain, the pleadings are the operative papers for identifying issues in summary judgment proceedings.

did address the original four theories of liability. As to Finch's diagnosis and treatment, Cello opined the colonoscopy was the appropriate diagnostic examination and no further testing was necessary. Cello implicitly addressed the need for a specialist by opining that Finch met the standard of care of a specialist. Cello opined that Finch met the standard of care in performing the colonoscopies, noting his high degree of competency due to his ability to identify small lesions. On the issue of the failure to find a tumor, Cello opined Finch performed competently and stated there was no evidence that Finch failed to find a lesion that was cancerous.

If plaintiffs disagreed with Cello's opinion or believed he did not consider all relevant factors in finding Finch met the standard of care (such as the need to follow-up on the CEA tests, the adequacy of assistance during the colonoscopies, or the need for imaging and better documentation) they could have timely provided an expert declaration to contradict Cello. Absent this conflicting expert evidence, Cello's opinion was sufficient to secure summary judgment for defendants. " ' "When a defendant moves for summary judgment [in a medical malpractice action] and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." ' [Citations.]" (*Hanson v. Grode, supra,* 76 Cal.App.4th at p. 607.)

Plaintiffs contend some of their theories of liability do not require an expert because they would be obvious to a lay person. " 'Ordinarily, the standard of care required of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field.' [Citation.] 'But to that rule there is an exception that is as well settled as the rule itself, and that is where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact." ' [Citation.]" (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [foreign object left in patient after surgery].) "The 'common knowledge' exception

is principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e., when a layperson 'is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.' [Citation.]" (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

Plaintiffs offer three theories that they claim meet this standard of common knowledge: performing the colonoscopies without a licensed or certified assistant present; being unable to diagnose Anderson's worsening condition; and performing tests geared toward diagnosing cancer (CEA tests) while telling the patient no cancer exists.

Plaintiffs assert Finch's medical assistant Lois Macauley, who was present during both colonoscopies, was not licensed or certified. What credentials are necessary for a person assisting a colonoscopy (and whether a medical assistant has such credentials) is not a fact within common knowledge. Further, plaintiffs failed to raise a triable issue as to whether Macauley was licensed or certified. In Finch's answers to interrogatories and requests for admissions, provided in support of plaintiffs' opposition to the summary judgment motion, Finch denied that no licensed medical professional was present. In support of their motion to amend, plaintiffs offered a printout from the website of the Medical Board of California that medical assistants are not licensed but may be certified. The trial court denied judicial notice of the material plaintiffs' counsel downloaded from the Internet, but even that material did not establish that Macauley lacked certification.

The failure to diagnose cancer is a matter requiring expert opinion, particularly where defendants provided expert opinion that all steps taken by Finch met the standard of care. As discussed *ante*, issues relating to the CEA test also require expert testimony.

D. *Failure to Accept Late Expert Declaration*

Finally, plaintiffs contend the trial court erred in failing to accept their untimely expert declaration. We find no error.

At the hearing on the summary judgment motion, counsel for plaintiffs stated: "If it really comes down to just needing another expert to say something contrary to the one issue they've addressed, we have it." After the trial court indicated it would grant the motion for summary judgment, counsel asked the court to consider the new declaration, which she admitted defendants had not seen. The court denied leave to file the declaration, noting there was no motion to continue the summary judgment hearing for further discovery or to provide additional declarations and the new declaration was offered only after the court had made its final decision.

"An opposition to the [summary judgment] motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (§ 437c, subd. (b)(2).)

A trial court has broad discretion to refuse to consider papers submitted after the deadline where there is no prior court order finding good cause for the late submission. (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765.) Here the record shows the trial court did not abuse its discretion in refusing to file the late declaration. Plaintiffs did not offer the declaration until *after* the court had ruled and even then offered no explanation for the late submission. Had plaintiffs needed more time to respond to the summary judgment motion, it was incumbent on them to apply for a continuance. (§ 437c, subd. (h).) They did not do so. The trial court was not obliged to consider the untimely proffer of an undisclosed declaration.

The trial court did not err in granting defendants' motion for summary judgment.

III

Order for Witness Fees

Plaintiffs contend the trial court erred in ordering them to pay defendants' expert witness fees. Plaintiffs, however, have not provided an adequate record to demonstrate error.

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "It is well settled . . . that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) "Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant]. [Citation.]" (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

The judgment of May 13, 2015, awards defendants $12,662.35 in unspecified costs. The only mention in the record of an award of witness fees are entries in the register of actions. Defendants submitted a memorandum of costs, including $9,005 in witness fees, and plaintiffs moved to strike and tax costs. That motion was denied. None of these documents are included in the record on appeal. Without them we cannot determine on what basis defendants requested witness fees, or on what grounds plaintiffs opposed costs, or even if they opposed the portion of costs relating to witness fees. Because plaintiffs have failed to carry their burden of providing an adequate record, we cannot review the trial court's ruling on costs.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal under California Rules of Court, rule 8.278(a).

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Butz, J.